SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973.
No. 73-417.

ANDRE HAKIM,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent,

TWENTIETH CENTURY-FOX FILM CORPORATION,

Real Party in Interest.

Brief in Opposition to Petition for Writ of Certiorari.

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Before final judgment in his state court action, petitioner sought an extraordinary writ to compel the trial court to set aside a partial summary judgment (granted on February 5, 1973) which established certain affirmative defenses to petitioner's Complaint. On April 24, 1973 the California Court of Appeal denied the petition for the writ. On June 13, 1973 the California Supreme Court denied a petition for hearing of the matter.

Although partial summary judgments on the merits of two of defendant's counterclaims for fraud were granted on May 31, 1973, the matter has not been tried and no final judgment has been entered in the California action.

The Issue.

The issue herein is whether a plaintiff may maintain a suit thereby subjecting a defendant to the jurisdiction and discovery power of a court, when plaintiff refuses to submit to discovery on matters relevant to his Complaint by invoking a privilege against self-incrimination.

Numerous cases in other jurisdictions have held that a plaintiff may not maintain his suit under such circumstances. These include:

Schrad v. Schrad, 183 N.W. 2d 922 (Nebr. 1971);

Minor v. Minor, 232 So. 2d 746 (Fla. 1970);

Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 149 (D.C. Wisc. 1968), *aff'd.* 416 F. 2d 967 (7th Cir. 1969);

Bauer v. Stern Finance Co., 169 N.W. 2d 850 (Ia. 1969);

Christenson v. Christenson, 162 N.W. 2d 194 (Minn. 1968);

Levine v. Bornstein, 174 N.Y.S. 2d 574, *aff'd.* 160 N.E. 2d 921 (N.Y. 1959).

See:

Steinbrecher v. Wapnick, 24 N.Y. 2d 354, 248 N.E. 2d 419, 425 (1969) [dictum].

See:

Franklin v. Franklin, 365 Mo. 442, 283 S.W. 2d 483 (1955) [dictum].

See:

Annest v. Annest, 49 Wash. 2d 62, 298 P. 2d 483 [dictum].

Cf. Indep. Productions Corp. v. Loew's Inc., 22 F.R.D. 266, 275 (D.C.N.Y. 1958).

Most of the foregoing cases have arisen subsequent to the 1967 Supreme Court decisions of the United States which plaintiff contends are the "law of the land." As the instant Superior Court reasoned, either numerous state courts are in open defiance of the Supreme Court, as plaintiff argued, or plaintiff has misconstrued the constitutional thrust of the Supreme Court decisions.

Indeed, plaintiff has cited no case to this Court which supports his position. No federal case ever has held that a litigant in the position of a *plaintiff* could maintain his suit and prevent discovery of relevant facts known to him by invoking a privilege against self-incrimination. Federal cases indicating the contrary include:

Kisting v. Westchester Fire Ins. Co., 290 F. Supp. 141, 149 (D.C. Wisc. 1968), *aff'd.* 416 F. 2d 967 (7th Cir. 1969);

Cf. Independent Productions Corp. v. Loew's, Inc., 22 F.R.D. 266, 275 (D.C.N.Y. 1958).

It is true that cases exist in both state and federal courts holding that a litigant in the position of a *defendant* may invoke a privilege against self-incrimination without being subject to having a default judgment entered against him. Plaintiff thus cites cases as *Garrity v. State of New Jersey*, 385 U.S. 493, *Spevak v. Klein*, 385 U.S. 511 and other *defendant* cases as supposed authority that a plaintiff may sue at will without being subject to examination upon the issues of the lawsuit.

At this point, we will not debate the wisdom or constitutionality of the decisions upon which the trial court

relied. Instead, we are confident that this Court will prefer not now to be concerned with the merits of the instant legal issue for the following reasons.

The Issue Has Become Moot.

In its First Amended Answer, defendant set forth five separate transactions in which it was alleged that Petitioner had made secret profits and had defrauded defendant of $448,000. Each of these five counts were pleaded as (i) an affirmative defense and (ii) as a counterclaim.

Extensive deposition testimony was obtained regarding the defenses and counterclaims. As a result, defendant moved for and obtained on May 24, 1973 a partial summary judgment establishing on the merits the truth of the matters set forth in two of said transactions. Proof of the facts in either of the two transactions would suffice as a complete defense to Petitioner's Complaint. *J. C. Peacock, Inc. v. Hasko,* 196 Cal. App. 2d 353, 16 Cal. Rptr. 518, 88 A.L.R. 2d 1430 (1961).

Consequently, it now is immaterial that Petitioner was barred from prosecuting his Complaint because he refused to testify concerning facts relevant thereto. Petitioner also is now and will be barred from recovery upon his Complaint because the Superior Court has adjudged him guilty of defrauding his former employer of $247,000 in two transactions.

Therefore, the issue which Petitioner seeks this Court to decide has become moot. Unless this Court desires

to render a hypothetical opinion on this issue, we respectfully submit that the Petition for Certiorari be denied.

Respectfully submitted,

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